

## **Treasury Department Progress Report to OMB on Tribal Consultation**

The Treasury Department (Treasury) has submitted a plan of action to implement the policies and directives of Executive Order 13175 (EO 13175) of November 6, 2000. EO 13175 requires agencies to have a process that ensures tribal consultation focuses on issues and regulatory or legislative activities that have tribal implications.<sup>1</sup> This progress report responds to the Presidential Memorandum, dated November 5, 2009, directing each department and agency to submit to the Director of the Office of Management and Budget, within 270 days and annually thereafter, a progress report on its plan of actions together with any proposed updates to its plan.

### **The Treasury Tribal Consultation Process**

In addition to the overarching Fundamental Principles set forth in Section 2 of EO 13175, three additional principles inform Treasury's implementation of its tribal consultation process and policies.

- Treasury is committed to the establishment of a comprehensive consultation process leading to meaningful dialogue with Indian tribes on Treasury policies that have implications for such tribes, and in particular those regulations and legislative proposals that have a direct and identifiable economic impact on Indian tribes or preempt tribal law.
- Tribal consultation will assist Treasury's development of policy, regulation, and legislative activities, as it will increase Treasury's understanding of the issues and potential impacts of activities on tribes and American Indians and Alaskan Natives.
- Treasury is committed to developing and issuing regulations and guidance in a timely and efficient manner.

In furtherance of these goals, the Treasury plan provides that each bureau and office is responsible for maintaining a well-defined set of procedures to achieve the following core objectives: (1) timely identification of matters that may require tribal consultation; (2) timely process for determining whether consultation is required; and (3) ongoing, pro-active tribal consultation processes.

### **Agency Point of Contact**

The agency point of contact for tribal consultation is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy (hereafter the Point Of Contact for Tribal Consultation or POCTC). The POCTC relies on Treasury's General Counsel (GC), and Executive Secretariat (ES) to identify issues that could require consultation prior to issuance of

Treasury policies. In addition to these Department-wide efforts, however, each Treasury bureau and office must undertake tribal consultation in accordance with EO 13175.

## **Consultation**

Tribal leaders have raised the following key issues in consultations with the Treasury Department.

- Consistently, tribes stress the importance of tribal sovereignty. True consultation is only possible when both parties understand that the relationship between tribes and the federal government is a government-to-government relationship.
- Tribal leaders regularly raise concerns about tax code matters affecting tribal governments, tribal corporations, and tribal members. Among several tax issues highlighted by tribal leaders, concerns about the general welfare doctrine were foremost.
- Tribal leaders raise a number of concerns regarding access to capital for economic development. In particular, tribal leaders underscore their interest in the structure and allocation of authority to issue tax-favored bonds under the Tribal Economic Development Bond program, and increased funding for the well-regarded Community Development Financial Institutions (CDFI) Fund's Native American program.

These points have been raised during consultation since early 2009, and the Treasury Department has taken these matters seriously. As sustained consultation has continued, the Treasury Department has developed concrete responses to several of the tribal leaders' key concerns. These responses are described below.

## **Tribal Sovereignty**

Tribal consultation must take place from an understanding that exchanges between the federal government and tribal governments are conducted on a government-to-government basis, predicated on mutual understanding and respect for tribal sovereignty. A strong consultation process requires open lines of communication in both directions. Tribal leaders need to be able to contact Treasury easily to request a meeting, ask about a specific program, or submit their views on a particular issue. Treasury needs to be able to communicate with tribal leaders in a clear, consistent, and transparent manner, and easily solicit tribal views on policy matters.

To accomplish these objectives, several institutional structures are now in place to facilitate communication.

- The Treasury Department has created an email address, [Tribal.Consult@Treasury.gov](mailto:Tribal.Consult@Treasury.gov), to which any tribal leader may send a tribal consultation request.

- The Department has a dedicated [tribal consultation webpage](#). It is regularly updated with requests for information from tribal leaders and other interested parties, policy statements, reports on recent consultation activities, and reports to Congress. We have also released our tribal consultation plan so that any tribe or interested party can see how Treasury is fulfilling our tribal consultation requirement.
- We have engaged in multiple consultation processes over a wide variety of issues, including Tribal Economic Development Bonds and the application of the general welfare doctrine. In addition, we continue to hold general consultation and listening sessions to solicit input from tribal leaders and enable tribal leaders to ask detailed questions directly of Treasury officials.

Consultation can and must take place both in Washington, D.C. and in Indian country. Treasury's POCTC Aaron Klein has engaged in consultation and listening sessions in South Dakota, Oregon, Connecticut, and Louisiana. Other Treasury officials have travelled across the country to conduct specific outreach efforts, including a series of conferences and events regarding access to capital, which the CDFI Fund, the Federal Reserve Banks of Minneapolis and San Francisco, and several other federal agencies co-sponsored. The IRS, and particularly the Indian Tribal Governments Office, has regularly held tribal consultation sessions in a variety of venues across the country.

Tribal leaders often raise issues that concern both Treasury headquarters ("Departmental Offices") and IRS. To best address these concerns, we have regularly held joint consultation sessions where tribal leaders engage with senior officials from both Departmental Offices and IRS simultaneously. This approach maximizes efficiency and encourages a more collaborative process.

### **The General Welfare Doctrine and Taxable Income**

*General Welfare Doctrine.* During the course of our consultation efforts, as noted above, tribal leaders repeatedly raised concerns regarding whether certain payments or benefits provided by the tribe to members are excludable from taxable income under the general welfare doctrine. This exclusion governs the types and kinds of benefits that tribes can provide to their members without creating a taxable event. To be clear, it does not govern what benefits a tribe can provide its members. Tribes are free to provide benefits on whatever basis they see fit, subject to other provisions of law. This exclusion governs whether the provision of such a benefit constitutes taxable income on the part of the recipient.

Treasury and IRS listened to and considered the requests of tribal leaders for increased clarity on the application of the general welfare doctrine. We agreed to begin a consultation process dedicated exclusively to this issue late last year, holding our first consultation meeting on November 30, 2011 in conjunction with the President's Tribal Nations summit. On March 8,

2012, we held another large consultation session hosted by the National Congress of American Indians in conjunction with their annual conference. To provide an opportunity for direct dialogue for all tribal leaders who were not able to make the earlier in-person consultation sessions, we also held a nation-wide conference call on May 30, 2012. In all of these meetings, the Treasury Department and the IRS participated jointly. Exact attendance figures are not known but it appears that approximately 300 people in total attended these events.

Our tribal consultation included extensive written communication, in addition to meetings and phone calls. Specifically, the IRS issued Notice 2011-94 on November 15, 2011, inviting comments concerning the application of the general welfare exclusion to Indian tribal government programs. When various tribal leaders requested additional time to submit comments, we accommodated their requests by extending the deadline by an additional 30 days. The IRS received over 65 comments from tribes and tribal leaders within the official comment period, and more than 20 additional comments subsequently.

Through our review of the written comments, our direct consultation efforts, and our own internal analysis, it is clear to us that additional guidance and clarity on the general welfare doctrine is warranted. The IRS has now committed publicly to issuing new, published guidance on this subject. The comments and positions thoughtfully articulated by tribes and tribal leaders during the consultation process will inform this guidance.

Also with respect to the definition of taxable income, the following new developments are noteworthy.

*Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases.* Certain recent settlements between the federal government and 55 distinct Native American tribes compensate tribes for their claims that the Department of the Interior mismanaged trust accounts, lands, and natural resources. Furthermore, the United States expects to enter additional agreements with other federally recognized Indian tribes to settle substantially similar claims. Several tribes and tribal representatives have raised questions related to the tax status of these settlement payments. Treasury has engaged in repeated consultations on this issue. Formal guidance on this matter was issued on September 6, 2012.

*Minor Trusts.* Following tribal consultation with both the Treasury Department and the IRS, the IRS announced [Revenue Procedure 2011-56](#) on November 14, 2011. This new guidance provides increased flexibility in procedures that provide a safe harbor for Indian tribes to establish trusts for tribal members who are minors or legally incompetent, for the distribution of gaming revenues under the Indian Gaming Regulatory Act (IGRA).

*Returning Heroes and Wounded Warriors Work Opportunity Tax Credits.* Discussions during inter-agency meetings on administrative efficiency, organized last summer by OMB and the Senior Policy Advisor for Native American Affairs in the White House Domestic Policy

Council, provided some of the impetus for the Administration's support of the Returning Heroes and Wounded Warriors Work Opportunity Tax Credits program. This program does not target Native Americans directly, but it is important to Indian Country for two reasons. First, the armed forces enlistment rate of Native Americans is the highest of all widely-recognized demographic groups in the United States. Second, unemployment rates among Native American communities are also high.

The Work Opportunity Tax Credit (WOTC) reduces the initial hiring costs of private businesses. An employer who submits the necessary form receives a business tax credit for qualified wages paid to the employee during the first year of employment. The WOTC is intended to provide an incentive for employers to hire "individuals from certain target groups who have consistently faced significant barriers to employment. The main objective of this program is to enable the targeted employees to gradually move from economic dependency into self-sufficiency as they earn a steady income and become contributing taxpayers, while participating employers are compensated by being able to reduce their federal income tax liability."<sup>2</sup>

### **Pension Plans for Employees of Indian Tribal Governments**

The Department of the Treasury issued an Advanced Notice of Proposed Rule Making (ANPRM) on November 7, 2011 in order to solicit comments on and initiate a dialogue with the tribal community concerning guidance under consideration relating to the determination of whether a plan of an Indian tribal government is a governmental plan within the meaning of section 414(d) of the Internal Revenue Code. Section 414(d) was amended by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA '06) to include certain plans of Indian tribal governments and related entities. PPA '06 provides that the term "governmental plan" includes a plan which is established and maintained by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either, if all the services provided by employees participating in the plan are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

The Department of the Treasury and the IRS conducted several consultation sessions with tribes on the ANPRM following its issuance. Further consultation on this issue is contemplated before future guidance is finalized.

### **Access to Capital**

*Native American CDFI Assistance Program (NACA).* Access to capital is another critical concern raised repeatedly by tribes and tribal leaders during consultation. Treasury is actively engaged in helping tribes access capital to grow their local economies. Within the CDFI Fund – an office within Treasury's Office of Domestic Finance whose mission is to expand the capacity of financial institutions to provide credit, capital, and financial services to underserved

populations and communities in the United States – the Native American CDFI Assistance Program (NACA) focuses exclusively on establishing and strengthening CDFIs in American Indian, Alaskan Native, and Native Hawaiian communities. Some tribal leaders argue that NACA program is one of the most successful federal programs in promoting access to capital in Indian Country. There are 72 certified Native American CDFIs in operation throughout the country. Certified Native CDFIs have grown by over 80 percent since 2001, when there were just 14 Native CDFIs. Clearly there is demand among American Indians, Native Alaskans, and Native Hawaiians for the capital and institutional support provided by Native CDFIs.

In August of this year, the Treasury Department announced the results from our most recent round of funding for the CDFI NACA program. The CDFI Fund received 66 eligible NACA applications requesting \$20.94 million. The CDFI Fund made 33 awards totaling \$11.47 million to organizations located in 16 states. Since the NACA program was launched in 2001, the CDFI Fund has provided over \$80 million in Financial Assistance and Technical Assistance awards under the NACA Program.

The Treasury Department has designed this program to serve as a powerful and effective tool in the promotion of sustainable, long-run economic development. It brings basic financial services into Indian Country, and the Treasury Department is committed to working with tribes and tribal leaders to ensure its continued success.

*Tribal Economic Development Bonds.* The Treasury Department has also worked with Tribes to help improve their access to the capital markets. Under current law, tribes have a more limited authority to issue tax-exempt municipal debt than states and localities. Many have argued against this policy on a variety of grounds, including that it has inhibited economic development, hampered tribes' access to the capital markets, and is unfair when compared to the broader authority granted to state and local governments. The American Recovery and Reinvestment Act (Recovery Act) responded to these concerns by granting Treasury the authority to allocate \$2 billion of Tribal Economic Development Bonds (TEDBs) to tribal governments according to criteria more comparable to those applied to state and local government bonds. These allocations effectively grant tribes the authority to issue tax-exempt debt for a wide range of projects that previously would not have qualified for tax-exempt status.

In December 2011, the Treasury Office of Tax Policy released its Congressionally-mandated study of the TEDB program under Recovery Act guidelines, the [Report and Recommendations regarding Tribal Economic Development Bond provision under Section 7821 of the Internal Revenue Code](#). In keeping with Executive Order 13175, extensive consultations with tribal leaders preceded this Report. We received written comments from 27 tribes, tribal organizations, and interested parties in response to our open Notice in the Federal Register, as well as many other comments and insights collected through other consultation activities. The input received through consultation was invaluable as the Department sifted through the various policy options

available. Broadly speaking, tribal leaders' comments reflected their strong desire that the federal government grant tribal governments permanent and indefinite authority to issue tax-exempt debt, comparable to the authority enjoyed by state governments.

The Report concluded:

For reasons of tax parity, fairness, flexibility, and administrability, the Department recommends that Congress adopt the State or local government standard for tax-exempt government bonds... on a permanent basis for purposes of Indian Tribal government eligibility to issue tax-exempt governmental bonds, without a bond volume cap.<sup>3</sup>

Thus the Treasury Department recommends that Congress make permanent the experiment begun in the Recovery Act, by granting tribal governments authority to issue tax-exempt bonds following criteria that are broadly comparable to the criteria state and local tax-favored bonds meet currently. This conclusion is consistent with recommendations articulated by many tribes and tribal leaders. However, these recommendations require Congressional action.

*FY 2013 Budget Proposal.* In addition, in February 2012, the Treasury Department included a Federal tax legislative proposal in the Administration's FY 2013 Budget to provide more flexible tax-exempt bond authority for Indian tribal governments to implement the recommendations from the Treasury Department's December 2011 Report to Congress regarding the TEDB program described above.

*Re-Allocation of Existing TEDB Authority under the Recovery Act.* In July 2012 the IRS released [Notice 2012-48](#), 2012-31 I.R.B. 102 (July 30, 2012), which provides guidelines and application forms for the re-allocation of approximately \$1.8 billion in remaining unused national bond volume authority for TEDBs. These guidelines will be followed to re-allocate authority that was previously allocated in accordance with the Recovery Act but subsequently forfeited. Extensive consultation with tribal leaders preceded the development and announcement of these new guidelines.

### **Additional Outreach to Indian Country**

- On December 16, 2011, POCTC Aaron Klein represented the Treasury Department at the White House Tribal Nations Conference. As a panelist for a workshop on economic development, Mr. Klein heard and responded to concerns from tribal leaders on a number of issues including Treasury programs providing access to capital, tax credits targeted to Native American and Alaskan Native tribes, and tribal and state government sovereignty.
- On June 14, 2012, POCTC Aaron Klein and Christie Jacobs, the Director of the Indian Tribal Governments Office at the Internal Revenue Service (IRS ITG Director), testified before the Senate Committee on Indian Affairs at a hearing entitled "New Tax Burdens on Tribal Self-Determination."

- On October 12, 2011, POCTC Aaron Klein addressed the Native American Finance Officers Association's (NAFOA) 29th Annual Finance Conference for Indian Country in Uncasville, Connecticut. On March 20, 2012, Mr. Klein gave a luncheon keynote presentation at the 30th Anniversary NAFOA Conference for Indian Country in New Orleans, Louisiana.
- On July 17 2012, John Cross, Associate Tax Legislative Counsel in the Office of Tax Analysis, spoke at the Native American Financial Officer Association's third Annual Tribal Bond Investors Summit about the reallocation guidelines for the Recovery Act Tribal Economic Development Bond program.
- Treasury's CDFI Native American Assistance Program (CDFI/NACA) and the Seattle Branch of the Federal Reserve Bank of San Francisco (FRB/SF) co-sponsored a series of workshops in 2011 on the theme "Growing Economies in Indian Country: Taking Stock of Progress and Partnerships." As part of the workshops, a National Summit was held on May 1, 2012, in Washington, D.C.
- The Office of Financial Markets will be meeting with the Yankton Sioux and the Santee Sioux Tribes at their reservations to consult with them on Treasury's establishment and investment of their respective development trust funds on October 1, 2013, as required by P.L. 107-331, the Yankton Sioux Tribe and Santee Sioux Tribe Equitable Compensation Act. Acting Deputy Assistant Secretary for Government Financial Policy Bret Hester will be meeting with the Chairmen of and Tribal Councils of the two Tribes on September 26 and 27, 2012.

## **Conclusion**

Treasury is committed to robust tribal consultation. Consistent with its tribal consultation plan of action, Treasury has engaged in careful screening and extensive consultation during the past year. Although Treasury is actively monitoring its tribal consultation process to ensure that it fulfills the mandate of EO 13175 and will propose updates if and when necessary, the process appears to be working effectively at this time to ensure meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications.



## **Appendix A: Description of Current Treasury Department Tribal Consultation Process**

**Guiding Principles:** In addition to the overarching Fundamental Principles stated in Section 2 of Executive Order 13175 (EO 13175), three principles guide our development of the Treasury Department's consultation process and policies.<sup>4</sup>

- The Treasury Department is committed to the establishment of a comprehensive consultation process leading to meaningful dialogue with Indian tribes on Treasury policies that have implications for such tribes, and in particular those regulations and legislative proposals that have a direct and identifiable economic impact on Indian tribes or preempt tribal law.
- Tribal consultation will assist Treasury's development of policy, regulation and legislative activities, as it will increase Treasury's understanding of the issues and potential impacts of activities on tribes and American Indians and Alaskan Natives.
- The Treasury Department is committed to developing and issuing regulations and guidance in a timely and efficient manner.

**Agency Point of Contact:** The agency point of contact for tribal consultation is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy (hereafter the Point Of Contact for Tribal Consultation or POCTC). The POCTC relies on Treasury's General Counsel (GC) and Executive Secretariat (ES) to identify issues that could require consultation prior to issuance of Treasury policies. In addition to these Department-level efforts, however each Treasury bureau and office must undertake tribal consultation in accordance with EO 13175.

**Consultation:** Consultation is designed to strengthen relationships between the U.S. government and sovereign tribal governments, and to reduce the impact of unfunded mandates on tribal governments and tribal members to the extent practicable and permitted by law. Under EO 13175, new legislative proposals, regulations, and administrative practices, including changes to existing policies, require consultation to the extent that they affect tribal governments and/or tribal members exclusively or in a significantly disproportionate manner relative to the majority of U.S. residents, or to the extent these policies target Native Americans or Alaskan Natives explicitly.

**Methods and Scope:** Bureaus and offices may routinely incorporate tribal consultation into Federal Register (FR) notices and Department guidance. This process may be sufficient, for example, when program staff deal exclusively with highly-complex and/or sophisticated financial matters affecting a small number of well-known constituent groups.<sup>5</sup> In other cases bureaus and offices that work directly with a variety of tribal governments and tribal members

may develop, in consultation with tribal governments and members, detailed guidelines on tribal consultation practices, regular schedules for consultation meetings during regional conferences, and a dedicated staff. Examples of each approach are attached in Appendix D. The POCTC is expected to maintain examples that bureaus and offices may review when revising their own consultation guidelines.

**Treasury-Wide Policy on Tribal Consultation:** The tasks undertaken by different Treasury bureaus and offices are complex and varied. Findings during internal and external review of the Treasury Department's current tribal consultation practices are consistent with this view.<sup>6</sup> Therefore, the Treasury Department does not prescribe a single, uniform approach to tribal consultation. Rather, each bureau and office is responsible for maintaining well-defined procedures to achieve the following core objectives.

- *Timely identification of matters that may require tribal consultation*, to include regulative and legislative activities that fall within the span of bureau or office operations as well as direct program responsibilities.
- *Timely process for determining whether consultation is required*, to include timely notice to the POCTC of non-routine issues of importance regarding legislative activities, regulations, and administrative practices that may require tribal consultation. The POCTC is also available for advice on the consultation process as needed.
- *Ongoing, pro-active tribal consultation processes*, to include early outreach to solicit comments from tribal governments and members who may be substantially affected by changes in laws, regulations or policies under consideration, when it has been determined that EO 13175 requires consultation. Outreach should incorporate an open process through which tribal governments may pro-actively consult with the Treasury bureau or office, on a government-to-government basis, regarding matters that involve tribal and federal law, regulations, and administrative practice.

Each Treasury bureau and office is expected to identify consultation procedures to meet the core objectives listed above. These core objectives are discussed below in greater detail.

#### Timely Identification of Matters That May Require Tribal Consultation

Program and/or legislative staff in each Treasury bureau and office are responsible for identifying pending legislation and regulations that may disproportionately affect tribal governments and members.

- Explicit criteria consistent with the mandate of the bureau or office should be developed and made clear to program and legislative staff, and to points of contact in the appropriate

legal office. Documents describing these criteria should be forwarded to the POCTC as they are completed.

- Indicators of disproportionate effects on tribal governments and members will be specific to each Treasury bureau or office. Examples are suggested in Appendix C. Bureaus and offices are encouraged to revise or replace these examples, as appropriate, so program staff and legal counsel may use them to identify issues within their program mandate that are likely to require tribal consultation. For examples of recent practices, see Appendix D.

### Timely Process for Determining Whether Consultation is Required

Each bureau and office is expected to comply with EO 13175 and to initiate consultation at the earliest stage possible. In general, program or legislative staff in each Treasury bureau and office should inform the POCTC regarding pending legislation, regulations and administrative practices that may require tribal consultation. In keeping with EO 13175, bureaus and offices are asked to document tribal consultation in the preamble to Federal Register notices regarding agency regulations that have tribal implications.<sup>7</sup> Similarly, Treasury Department legislative proposals that have tribal implications should not be submitted prior to tribal consultation.<sup>8</sup>

The POCTC is available to assist Treasury bureaus and offices in the identification of laws, regulations, and administrative practices that require tribal consultation, if the application of the requirements of EO 13175 is questionable in the view of program staff. In such cases the POCTC will respond to the inquiry within 15 days. If the POCTC and Treasury bureau or office subsequently agree that consultation is required, consultation should be initiated within 30 days. If the POCTC and Treasury bureau or office disagree on the need for tribal consultation, the question will be referred to GC.

To ensure that EO 13175 is followed, ES and GC shall ask each bureau or office, at the earliest stage that it becomes apparent an activity might require consultation, whether or not a consultation decision has been made. If the associated clearance documents do not indicate explicitly that tribal consultation is completed, planned, or under way, then whenever practicable GC, ES, or Legislative Affairs will return the documents to program staff for clarification and alert the POCTC to the potential need for consultation. In some cases time constraints may require a staged approach, in which a plan for more extensive tribal consultation is identified and a commitment is made to consult within a specified time frame.

### Ongoing, Proactive Tribal Consultation Process

*Target Audience:* Treasury bureaus and offices should consult directly with tribes and tribal governing officials on matters that disproportionately affect such tribes and officials. When it is appropriate and useful, inter-tribal organizations representing the interests of tribes in Indian

Country should be consulted as well. However, consultation with tribal governments, through tribal leaders and officials, is required. Reliance solely on discussions with inter-tribal organizations does not constitute consultation on a government-to-government basis under EO 13175, in most instances.<sup>9</sup>

*Methods of Consultation:* Each bureau and office may develop its own method of consultation, following the guiding principles above. The POCTC will maintain a record of Treasury's consultation efforts and will make available to the bureau or office descriptions of various methods that have been used in the past. The POCTC will assist the bureau or office in developing a consultation plan. Consultation plans may include, but are not limited to the following.

- Federal Register (FR) notices soliciting comment on the proposed idea. FR notices requesting comments from tribal governments and members regarding proposed changes in law or regulation should be published as soon as practicable after Treasury staff have determined that tribal consultation is necessary, and ideally within 30 days. When tribal consultation is indicated, a 60- to 120-day minimum comment period should be specified in the FR notice whenever practicable, to allow sufficient time for tribal leaders to consult with their members and legal counsel on any matters of particular concern, and to formulate a response to the notice.

Copies of all FR notices requesting comments from tribal governments and members, together with brief descriptions of other tribal consultation activities, should be sent to the POCTC to become part of a comprehensive record of Treasury activity.<sup>10</sup>

- *Meetings, conference calls, videoconferences and workshops to encourage an exchange of views.* When Treasury policies explicitly target Native American and Alaskan Native governments, organizations, or members, or when the issue is complex with a disproportionate effect on tribes and tribal members, consultation should extend beyond FR notices to the extent practicable. Consultation may be conducted through email, regular mail, telephone calls, video conferences and in-person meetings or conferences, as schedules and resources permit. Disparities in time zones and travel costs should be taken into account when scheduling phone calls and conferences, noting that Alaskan Native tribes are located to the extreme west.
- *Targeted outreach.* Contact information for federally-recognized tribes is available on the Bureau of Indian Affairs web site.<sup>11</sup> The POCTC also maintains a Treasury-specific list, including contact points for some inter-tribal organizations. These organizations often sponsor conferences attended by leaders and officials from many tribes. These conferences may, therefore, provide opportunities for agency listening sessions and/or presentations that are cost-effective from the perspective of tribal governments.<sup>12</sup>

*Open process:* An open process should be identified explicitly through which tribal governments may pro-actively consult with each Treasury bureau or office, on a government-to-government basis, regarding matters that involve tribal and federal law regulations, and administrative practice.

- [Tribal.Consult@treasury.gov](mailto:Tribal.Consult@treasury.gov). Tribal governments may channel information or concerns to the Treasury Department email address, [Tribal.Consult@treasury.gov](mailto:Tribal.Consult@treasury.gov) or to the POCTC. These points of contact may be used only for general information and concerns. Specific cases involving particular tribal governments and tribal members must be referred to the bureau(s) or office(s) with direct jurisdiction.
- Meetings and workshops. Intra- and inter-agency sponsorship of meetings to address areas of concern is encouraged to conserve resource and ensure comprehensive coverage.

## **Appendix B: List of Programs in Various Treasury Bureaus and Offices that are Actively Involved in Issues affecting Tribal Governments and Members**

### **Comptroller of the Currency**

<http://www.occ.treas.gov/Cdd/Nativeam>

The Office of the Comptroller of the Currency (OCC) is reviewing its process independently.

### **Bureau of the Public Debt**

<http://www.publicdebt.treas.gov/>

<http://www.treasurydirect.gov/govt/reports/tfmp/tfmp.htm>

<http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Financial-Markets.aspx>

Treasury is required by statute to invest and is investing two Indian tribal funds and one “tribally related” fund from which payments are being made to several Indian tribes as well as to non-Indian entities. The two tribal funds currently being invested by Treasury are the Cheyenne River Sioux and the Lower Brule Sioux Tribes’ Terrestrial Wildlife Habitat Restoration Trust Funds (the “Title VI Funds”). As with the tribal funds invested by Interior, by statute, Treasury is required to disburse amounts from the interest earned by the Title VI Funds to the tribes involved as requested for certain statutorily-prescribed purposes.

The one “tribally related” fund that Treasury is required to invest is the Lower Colorado River Basis Development Trust Fund (LCRBDTF). The LCRBDTF is an Interior fund, which Treasury is required by statute to invest. Interior determines the amounts to be invested and the maturities of such investments, which are in Treasury securities.

Treasury consulted extensively with the Cheyenne River Sioux and the Lower Brule Sioux Tribes regarding Treasury-proposed amendments to the investment and disbursement provisions for their Title VI Funds. The Treasury amendments were enacted into law in November 2007 and have been implemented. The amendments require Treasury to review the investment of the funds with the two tribes involved on at least an annual basis, in addition to providing monthly reports to the tribes on the investment activities of their funds.

- The Office of Financial Markets will be meeting with the Yankton Sioux and the Santee Sioux Tribes at their reservations to consult with them on Treasury’s establishment and investment of their respective development trust funds on October 1, 2013, as required by P.L. 107-331. Acting Deputy Assistant Secretary for Government Financial Policy Bret Hester will be meeting with the Chairmen of and Tribal Councils of the two Tribes on September 26 and 27, 2012. The Bureau of the Public Debt and the Office of Financial

Markets will work together with the two Tribes to establish and invest the funds as of October 1, 2013.

### **Community Development Financial Institutions Fund**

[http://cdfifund.gov/what\\_we\\_do/programs\\_id.asp?programID=3](http://cdfifund.gov/what_we_do/programs_id.asp?programID=3)

The Community Development Financial Institutions Fund (CDFI), established in September 1994 under the Riegle Community Development and Regulatory Improvement Act (RCDRIA), sponsors Native Initiatives designed to increase access to credit, capital, and financial services in Native communities. These initiatives serve to create and expand CDFIs primarily active in Native communities. The RCDRIA mandated that the CDFI Fund conduct a study of lending and investment practices on Indian reservations and other lands held in trust by the United States. This study recognized barriers to private financing, identified the impact of such barriers on access to capital and to credit for Native peoples, and provided options to address these barriers.

CDFIs are non-government financial entities whose primary mission is to promote community development, principally by serving and being accountable to a low-income community, and by providing development services. To be certified as a Native CDFI, an organization must meet the CDFI eligibility requirements and direct more than 50 percent of its activities to Native communities and/or Native persons.

Following the November 2001 release of the CDFI Fund's Native American Lending Study, the Fund formulated two chief strategies for overcoming barriers to credit, capital, and financial services in Native communities:

- Expanding Native Opportunities (ENO), training programs that work to develop new Native CDFIs, strengthen existing Native CDFIs, and assist Native CDFIs in creating financial education and asset building programs in Native communities.
- The Native American CDFI Assistance (NACA) Program, a funding program that aims to increase the number and capacity of existing or new Native CDFIs.

In July 2009, the CDFI Fund also released its Native Initiatives Strategic Plan for Fiscal Years 2009-2014, which was designed following a review and analysis of the Native American Lending Study, feedback from listening sessions conducted in fiscal years 2007 and 2008, and trends and data analysis from the NACA Program applications and awards since fiscal year 2004. Contingent on funding and resource availability, the Strategic Plan will guide the CDFI Fund's implementation of its Native Initiatives over the next five years.

Expanding Native Opportunities is a training initiative sponsoring financial education and asset building programs that are fully funded by the CDFI Fund and administered by contractors selected through a competitive bidding process. These programs were:

- Native Communities Financing Initiative (NCFI), an intensive series of workshops and follow-up technical assistance conducted over a 12-month period to help Native communities develop and expand Native CDFIs.
- Native Entrepreneur and Enterprise Development Initiative (NEED), which focuses on entrepreneurship development systems, curricula integration, and program development at the local level.
- Native Financial Skills Initiative (NFSI), which instructs the trainers in the Building Native Communities financial education curriculum and integrated asset building programs.

Currently, the CDFI Fund is sponsoring a training series for two years for Native CDFIs called The Leadership Journey: Native CDFI Growth & Excellence (The Leadership Journey), during which time Native CDFI leaders will develop leadership skills and resources to further staff growth and increase organizational performance.

The NACA Program serves economically distressed Native American, Alaska Native, and Native Hawaiian communities across the nation by providing funding to build the organizational capacity of Certified Native CDFIs, Emerging Native CDFIs, and Sponsoring Entities. As of June 30, 2012, there are 72 certified Native CDFIs.

The CDFI Fund provides two types of funding through the NACA Program. Financial Assistance awards, used primarily for financial capital, are available only to entities that have been certified as Native CDFIs. Technical Assistance grants are available to certified Native CDFIs, Emerging Native CDFIs, and Sponsoring Entities.

- Usually Technical Assistance grants are used to acquire products or services including computer technology, staff training, and professional services such as market analysis, and support for other general capacity-building activities.
- Sponsoring entities are unique to the NACA Program. They create and support fledgling Native organizations as they move toward CDFI certification.

On August 6, 2012, the CDFI Fund announced awards totaling \$11.47 million to NACA Program participants in the FY2012 funding round. NACA received 66 applications requesting \$20.94 million for the funding round. Awardees' primary financing activities are small business/venture capital, affordable housing, and consumer loans.

In May 2011, the CDFI Fund also announced an intergovernmental workshop series to promote economic development in Native American communities. The series was entitled "Growing Economies in Indian Country: Taking Stock of Progress and Partnerships," and it sought to further the efforts of the CDFI Fund and the Federal Reserve to engage federal partners and local



stakeholders in identifying best practices for economic and community development in Native communities. The workshops focused on three areas: governance and infrastructure, small business finance, and economic development. They offered an opportunity for networking and providing feedback on economic development in Indian Country. See [http://www.cdfifund.gov/news\\_events/CDFI-2011-08-2011-Native-Economic-Development-Workshop-Series-Open-for-Registration.asp](http://www.cdfifund.gov/news_events/CDFI-2011-08-2011-Native-Economic-Development-Workshop-Series-Open-for-Registration.asp).

The CDFI Fund Native Initiatives website includes a link to the [2001 Native American Lending Study](#) and the Native Initiatives Strategic Plan for Fiscal Years 2009-2014.

For an example CDFI-initiated FR consultation, see March 8, 2010 (Volume 75, Number 44)] CDFI request for comments. Also see March 11, 2010 (Volume 75, Number 47).

### **Financial Crimes Enforcement Network**

<http://www.fincen.gov>

The Financial Crimes Enforcement Network (FinCEN) typically deals with complex and/or sophisticated financial matters that affect a small number of well-known constituent groups. Casinos are included in this category because they are vulnerable to exploitation through money laundering activities. FinCEN staff works closely with tribally-owned casinos for this reason. FinCEN is part of the inter-agency Indian Gaming Working Group, which also includes the National Indian Gaming Commission, the Department of Justice, the Federal Bureau of Investigation, the Internal Revenue Service, and the Bureau of Indian Affairs Law Enforcement Services.

### **Financial Management Services**

<http://www.fms.treas.gov>

The Financial Management Service's (FMS) Customer Relationship Managers (CRMs) have undertaken outreach to tribal governments and businesses. CRMs serve as the central point of contact for Federal Program Agencies (FPAs). CRMs can help FPAs to improve government-wide cash management practices.

FMS administers the surety bond program for the federal government under 31 U.S.C. 9304-9308 for companies that wish to: direct write federal bonds, reinsure federal bonds, or be recognized as an Admitted Reinsurer.

## **Internal Revenue Service**

<http://www.irs.gov/tribes>

The overall goal of the IRS' Indian Tribal Governments Office (ITG) is to use partnership opportunities with Indian tribal governments, including Alaska Native governments, tribal associations, and other federal agencies, to respectfully and cooperatively meet the tax administration needs of both the Indian tribal governments and the federal government. Five ITG field groups consisting of tribal government specialists work in locations near the seats of tribal governments. ITG specialists can address issues that relate to tribal governments as employers, distributions to tribal members, and the establishment of governmental programs, trusts and businesses. ITG has consulted extensively with tribal governments throughout the development of its programs and is currently leading a review of the IRS to ensure the agency complies with EO 13175.

Significant guidance was published in 2012 on items ranging from minor trusts to tax exempt bonds. Many of those items are discussed on pages 3-5 of this report. In addition, on September 6, 2012, Treasury and IRS issued Notice 2012-60 which clarified the income tax treatment of per capita payments to tribal members from numerous Tribal Trust case settlements.

The IRS continues to partner with tribal governments to establish Volunteer Income Tax Assistance (VITA) sites in their local communities. The VITA program has a three-pronged approach which includes Financial Education and Asset Building, Tax Education, and Tax Preparation. The Tax Preparation goal is to provide free tax preparation service for low to moderate income taxpayers. During 2012, the IRS continued to expand partnerships with tribal organizations and coalitions of tribal governments that share knowledge and resources to prepare free tax returns in their local communities.

## **Office of Financial Stability**

<http://www.financialstability.gov>

The Troubled Asset Relief Program (TARP), Public-Private Investment Program (PPIP), and Community Development Capital Initiative Program (CDCI) were established under the Emergency Economic Stabilization Act of 2008 (EESA). Under EESA authority, Treasury contracted with large, established financial management institutions to evaluate and manage portfolios of troubled assets.

- Treasury contracts strongly encouraged PPIP fund managers to establish sub-contracting relationships with leading small and veteran-, minority-, and women-owned financial services businesses. The Los Angeles private equity fund Oaktree Capital Management LP (Oaktree), one of Treasury's primary PPIP contractors, sub-contracted with Inupiat

Eskimo-owned Arctic Slope Regional Corporation (Arctic Slope). Oaktree partners and consults with Arctic Slope in investment decisions.<sup>13</sup>

- CDCI, a separate component of TARP, invests lower-cost capital in specified CDFIs that lend to small businesses in the country's hardest-hit communities. Through CDCI, certified NACA CDFIs (described above) may be eligible to receive capital investments at a dividend rate of 2 percent for eight years. There are currently 82 institutions remaining in the CDCI program with outstanding investments of approximately \$563 million.<sup>14</sup>

### **United States Mint**

<https://www.usmint.gov>

[http://www.usmint.gov/mint\\_programs/nativeamerican/](http://www.usmint.gov/mint_programs/nativeamerican/)

The United States Mint's Citizens' Coinage Advisory Committee discusses and reviews candidate designs for coins and currency, and the Department of the Treasury makes the final design selections. The United States Mint consults with Native American and Alaskan Native tribes on the design of coins and currency when indicated. Starting in 2009, the United States Mint minted and issued \$1 coins featuring designs commemorating the contributions made by Native American tribes and individuals over the course of United States history. The theme for the 2012 Native American \$1 Coin is "Trade Routes in the 17th Century." Its reverse design features a Native American and horse in profile with horses running in the background, representing the historical spread of the horse. The design includes the required inscriptions, UNITED STATES OF AMERICA and \$1.

The Native American \$1 Coin Act (Public Law 110-82), which was signed into law in 2007, created the program. The law requires that at least 20 percent of \$1 coins minted and issued in a given year must be Native American \$1 coins. In keeping with the design of the Sacagawea coin first produced in 2000, the program is responsible for minting \$1 coins annually that feature an image of Sacagawea on the obverse side of the coin and designs on the reverse side that change from year to year in celebration of important tribal contributions. For example, the 2010 Native American \$1 coin featured an image of the Hiawatha Belt with five arrows bound together, while the 2011 Native American \$1 coin was emblazoned with the hands of the Supreme Sachem Ousamequin Massasoit and Governor John Carver. Until at least 2016, the United States Mint is responsible for preparing a timeline of notable Native American events and personal contributions that will provide potential designs for the \$1 coins. When evaluating these designs, the United States Mint consults with the Senate Committee on Indian Affairs, Congressional Native American Caucus, National Congress of American Indians, and U.S. Commission of Fine Arts.

## **Appendix C: Possible Criteria for Tribal Consultation**

Specific criteria that Treasury bureaus and offices may use to identify legislation and regulations requiring consultation with sovereign American Indian and Alaskan Native (AI / AN) tribes are suggested below, together with illustrative examples.

1. Programs or policies that target AI/ANs explicitly or directly, and programs that target groups and activities in which AI/ANs are disproportionately represented, should engage in consultation early in the regulation drafting process. For example:
  - Policies that relate to the definition of permissible uses for which tribal governments can issue tax exempt debt.
  - Policies that specifically deal with the taxation of benefits provided by tribal governments, such as health care.
  - Programs that seek to increase the availability of capital to Native American owned or controlled financial institutions through additional support for Native American owned CDFIs, directly or as part of a targeted initiative toward similarly situated CDFIs.
  - Programs that seek to prevent exploitation of Native American tribes and tribal businesses through criminal and terrorist activities, such as money laundering activities that target tribally-owned gambling institutions.<sup>15</sup>
2. Tribal consultation process may be required when AI/AN tribes request consultation on substantive issues that are unique to tribal governments, when consultation is requested to address regulatory or legislative activities that are likely to have direct and identifiable economic impacts on Indian tribes, or when it is evident, or should be evident, that the contemplated regulations or legislation could preempt tribal law.

## **Appendix D: Attached in PDF Format**

[Agenda from May 1 2012 Summit, Growing Economies in Indian Country](#). This meeting in Washington, D.C., hosted by the Federal Reserve Board and the Federal Reserve Bank of Minneapolis, reported on a series of forums organized in conjunction with the Interagency Working Group for Indian Affairs' Committee on Economic Development. Treasury's CDFI/NACA Program was an influential participant in these activities.

[IRS Revenue Procedure 2011-56](#), announcing new guidance on revenue procedures that provide a safe harbor for Indian tribes to establish trusts for tribal members who are minors or legally incompetent, for the distribution of gaming revenues under the Indian Gaming Regulatory Act (IGRA).

## Endnotes

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<sup>1</sup> Activities with tribal implications, as defined in EO 13175, are ones that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

<sup>2</sup> See the [Department of Labor WOTC home page](#) for this language and additional details on the WOTC.

<sup>3</sup> Report and Recommendations to Congress regarding Tribal Economic Development Bond provision under Section 7871 of the Internal Revenue Code, p. 11. The full sentence reads, “For reasons of tax parity, fairness,...without a bond volume cap on such Governmental Bonds (subject to a project location targeting restriction and a gaming facility restriction.”

<sup>4</sup> EO 13175 is available at: [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2000\\_register&position=all&page=67249](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2000_register&position=all&page=67249).

<sup>5</sup> For example, the Treasury Financial Crimes Enforcement Network (FinCEN) guidance to gaming organizations is highly specialized, and it directly targets a relatively small number of organizations. Therefore routine requests for comments and guidance that includes brief mention of Indian gaming activities is often sufficient to fulfill EO 13175. See , e.g., FIN-2990-G004, “Frequently Asked Questions, Casino Recordkeeping, Reporting and Compliance Reporting Requirements,” September 30, 2009, available at [http://www.fincen.gov/statutes\\_regs/guidance/html/Casino\\_FAQs\\_List.html](http://www.fincen.gov/statutes_regs/guidance/html/Casino_FAQs_List.html)

<sup>6</sup> Brief descriptions of relevant activities in Treasury bureaus and offices are provided in Appendix B.

<sup>7</sup> If agency regulatory policies have tribal implications (defined in Section 1 (a) of EO 13175 and the outset of this document), then under Sections 5(b)(2)(B) and 5(c)(2) of EO 13175 the Director of OMB should be provided, in the preamble to Federal Register announcements regarding regulations, a description of the agency’s prior consultation, a summary of the nature of tribes’ concerns, the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met.

<sup>8</sup> Under Section 4 of EO 13175, “Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3”.

<sup>9</sup> EO 13175 permits consultation to proceed with *authorized* inter-tribal organizations. However, in initial consultation with tribal leaders during the spring of 2010 many stressed the importance of direct communication with tribal officials and argued explicitly that consultation with inter-tribal organizations is not sufficient. Therefore, the Treasury Department recommends direct outreach whenever practicable.

<sup>10</sup> This information will provide the basis for annual reports that the Treasury Department is required to submit to OMB under EO 13175.

<sup>11</sup> The Bureau of Indian Affairs, Department of Interior, maintains and regularly updates a [Tribal Leaders Directory](#).

<sup>12</sup> During the past year, for example, Departmental Offices and Treasury have participated in consultation sessions hosted by the National Congress of American Indians (NCAI) and the Native American Finance Officers’ Association (NAFOA).

<sup>13</sup> Arctic Slope, a tribally-owned business participating in the PPIP through its partnership with Oaktree, participates in the investment process. [A more complete description of the PPIP](#), is available on the Treasury Department’s website, for example on the TARP Public-Private Investment Program web page.

<sup>14</sup> Additional details are available in the [CDCI Program Status description](#), on the Treasury web page.

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<sup>15</sup> See [Casino Issues](#) after searching for Indian Tribal Governments on the IRS web site. For earlier background see “Anti-Money Laundering Controls for Indian Tribal Casinos,” February 22, 1996, [http://www.fincen.gov/news\\_room/nr/html/19960222.html](http://www.fincen.gov/news_room/nr/html/19960222.html) .